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## Stock Subscription Law for Practitioners

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# STOCK SUBSCRIPTION LAW FOR PRACTITIONERS

Richard O. Kummert\*

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## I. INTRODUCTION

Law review analysis of stock subscription law—the law related to promises to pay to a corporation a stated sum for a specified number of unissued shares—has been noticeably lacking in recent years.<sup>1</sup> I suspect the most prominent reasons for the void center on the feeling in the academic community that subscriptions are used infrequently and that in any event the law related to them is settled. The material that follows demonstrates that both these propositions are false: subscriptions appear to be used with some frequency in the formation of small corporations, and the law related to them remains complex and

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1. The most recent publication on this subject is Comment, *Legal Effect of Preincorporation Subscription Agreements in California*, 19 HASTINGS L.J. 1418 (1968).

often difficult to locate. This article attempts to provide some guidance to practitioners who encounter this relatively intractable area of law.

Counsel may encounter questions regarding the validity of a stock subscription either in litigation or in planning a proposed transaction. Litigation related to stock subscriptions presents difficult questions as to which of a number of potentially applicable bodies of law ought to be applied. Partly because of such complexity, planners typically seek means of accomplishing transactions without the use of stock subscriptions.

#### *A. General Observations for Litigators*

Counsel trying a case in which the validity of a stock subscription must be determined encounter a complex pattern of law related to the subject:

One, stock subscriptions are securities<sup>2</sup> and thus are subject to the fraud<sup>3</sup> and registration provisions in federal securities<sup>4</sup> and state blue-sky laws;<sup>5</sup>

Two, most state corporation statutes<sup>6</sup> contain rules regarding at least certain aspects of stock subscriptions;<sup>7</sup>

Three, despite such statutes, many issues related to the validity of a stock subscription must be determined under state common law;<sup>8</sup>

Four, the cases in many jurisdictions are relatively old and frequently involve attempts by the courts to adapt contract principles<sup>9</sup> to the resolution of a controversy arising out of a public solicitation of subscriptions;<sup>10</sup> and

Five, while most of the recent cases involve closely-held corpora-

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2. L. LOSS, FUNDAMENTALS OF SECURITIES REGULATION 241-42 (1983).

3. For an example of the application of section 10(b) of the Securities Exchange Act of 1934 to a subscription, see *Hidell v. International Diversified Inv.*, 520 F.2d 529 (7th Cir. 1975).

4. Under section 2(1) of the Federal Securities Act of 1933, both preincorporation subscriptions and shares ultimately issued, as securities, require independent registration. L. LOSS, *supra* note 2, at 242 (1983). Professor Loss reports that few preincorporation subscriptions (none in recent years) have ever been registered. *Id.*

5. For a recent example of the application of a state blue-sky law to a subscription, see *Midwest Management Corp. v. Stephens*, 291 N.W.2d 896 (Iowa 1980). For earlier cases, see Annotation, *Applicability of Blue Sky Laws to Preincorporation Subscriptions*, 50 A.L.R.2d 1103 (1956).

6. Generally, the law applied to determine the validity of a stock subscription is the law of the state of incorporation. *E.g.*, *Klapmeier v. Flagg*, 677 F.2d 781 (9th Cir. 1982).

7. *See, e.g.*, *infra* notes 46, 73 and accompanying text.

8. *See, e.g.*, *infra* note 21 and accompanying text.

9. *See* Cataldo, *Conditions in Subscriptions for Shares*, 43 VA. L. REV. 353 (1957).

10. *E.g.*, *Coleman Hotel Co. v. Crawford*, 3 S.W.2d 1109 (Tex. Civ. App. 1928) (subscribers were citizens of a town); *see also* R. HAMILTON, CASES AND MATERIALS ON CORPORATIONS 259 (3d ed. 1986).

tions,<sup>11</sup> few cases apply fiduciary concepts developed in such cases to the stock subscription problem<sup>12</sup> and fewer still question the relevance of much of the older case law.

The discussion that follows focuses on issues related to state corporation statutes and decisions, as little controversy has arisen in recent years in the securities laws areas.

### *B. General Observations for Planners*

Counsel planning any transaction in which a stock subscription has been proposed should consider whether use of a subscription is necessary. As a result of securities law requirements and capital market practices, it appears that subscriptions are seldom efficacious in connection with public solicitations for funds.<sup>13</sup> There is also reason to consider the utility of subscriptions even in connection with the establishment of a closely-held corporation.<sup>14</sup> State statutes specifying a minimum level of subscriptions as a condition of incorporation have virtually been eliminated.<sup>15</sup> The general movement toward reducing procedural complexity in the incorporation process continues, with a concomitant reduction in the expense of incorporation. Counsel should therefore weigh carefully the strategy of incorporating first, followed by use of contracts for purchase of shares, as an alternative to the use of preincorporation subscriptions.

## II. BASIC REQUIREMENTS FOR A SUBSCRIPTION

### *A. Terms*

Most statutes do not specify what terms must appear in a share sub-

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11. *E.g.*, *Cerami v. Dignazio*, 283 Pa. Super. 424, 424 A.2d 881 (1980) (three shareholders in corporation, with two persons asserting rights as subscribers).

12. In *Bielinski v. Miller*, 118 N.H. 26, 382 A.2d 357, 359 (1978), the court in dictum was willing to accept greater informality in procedures in the case before it, which involved a close-corporation.

13. L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 242 (1983) reports that it has been many years since a subscription has been registered. *See also* 1 *MODEL BUSINESS CORP. ACT ANN.* 348 (3d ed. 1985).

14. Winton, *Private Corporate Stock Subscription Agreements*, 33 S. CAL. L. REV. 388, 389-90 (1960), suggests that the use of preincorporation subscriptions may lead to the development of a more concrete organization plan than would otherwise develop. R. JENNINGS & R. BUXBAUM, *CASES AND MATERIALS ON CORPORATIONS* 781 (5th ed. 1979), state that the case law has been quite critical of this argument.

15. But see the provisions in the recently amended HAW. REV. STAT. § 415-54(11)-(12) (1985), which requires that the articles of incorporation set forth the names of initial subscribers, the number of shares subscribed for, the price of each share subscribed, and the consideration (if other than cash) to be paid.

scription.<sup>16</sup> The case law is, for the most part, not very helpful on the subject.<sup>17</sup> However, the commentators are generally in accord that a subscription is an offer or promise to pay to the corporation a stated sum for a specified number of unissued shares.<sup>18</sup> Similar language appears in the few statutes that provide a definition for the term.<sup>19</sup>

*Molina v. Largosa*<sup>20</sup> raises the question of whether a subscription meeting the minimal common law requirements stated above will always be valid. Molina had signed a "subscription form" for the purchase of forty shares of stock (at \$50 per share) in a corporation to be formed. The form described the nature of the proposed corporation's business but did not set forth either its total capitalization or Molina's proportionate interest therein. Molina paid for the subscription before the corporation was formed. When it was formed, he was listed as a subscriber. The corporation failed. Molina brought suit for recovery of his investment, claiming in part that the subscription was invalid because it did not state the corporation's capitalization or his proportionate interest therein. The Hawaii Supreme Court affirmed the trial court's conclusion that the subscription was valid. It said that both claimed deficiencies could be ascertained simply by adding the investments of all subscribers as set forth in the affidavit filed with the articles of incorporation.<sup>21</sup>

Counsel drafting subscription agreements should note several aspects of this decision. First, the court did not simply state that the subscription was valid because traditional common law elements were present; instead, it apparently required that the subscriber's proportionate interest be determinable from public information related to the incorporation. Second, most jurisdictions do not require public filing of the information used by the court. Third, even if such information is not required as a matter of state corporation law, it seems virtually

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16. See REVISED MODEL BUSINESS CORP. ACT §§ 1.40, 6.20 (1984); MODEL BUSINESS CORP. ACT §§ 2, 17 (1969).

17. *E.g.*, *Brown v. North Ventura Rd. Dev. Co.*, 216 Cal. App. 2d 227, 30 Cal. Rptr. 568, 571 (1963) ("it has been held that any agreement to take stock in a corporation is a subscription"); see also *Cornhusker Dev. & Inv. Group, Inc. v. Knecht*, 180 Neb. 873, 146 N.W.2d 567, 571 (1966) ("[a]ny agreement by which a person shows an intention to become a stockholder . . . is sufficient as a contract of subscription . . .").

18. *E.g.*, 4 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1363 (rev. perm. ed. 1985); Schwenk, *Pre-incorporation Subscriptions: The Offer Theory And—What Is An Offer?*, 29 VA. L. REV. 460 (1943).

19. See N.C. GEN. STAT. § 55-43(b) (1982); PA. STAT. ANN. tit. 15, § 1002(22) (Purdon Supp. 1987); TEX. BUS. CORP. ACT ANN. art. 1.02(5) (Vernon 1980); UTAH CODE ANN. § 16-10-2(18) (1987).

20. 51 Haw. 507, 465 P.2d 293 (1970).

21. *Molina*, 465 P.2d at 294-95.

certain that it will be required to satisfy federal and state securities and antifraud rules.

### *B. Formal Requirements*

Many statutes at one time required subscriptions to be on, or contained in, specified forms.<sup>22</sup> Such requirements have generally been removed as legislatures have attempted to simplify the incorporation process. Courts, free of legislative restrictions, have generally ruled that “in the absence of statute or charter provisions to the contrary, stock subscriptions may be written or oral or in any form that would satisfy the requirements of a valid contract.”<sup>23</sup>

The diminished emphasis on use of precise forms or language in connection with a subscription appears to have led to increased litigation concerning the characterization of preincorporation agreements as subscriptions. A recent case, *Penley v. Penley*,<sup>24</sup> illustrates the point and the continuing importance, at least for some purposes, to be sure that an agreement is a “subscription.” It also illustrates just how difficult it is for courts to determine whether an agreement entered into by participants in a closely-held corporation constituted a subscription.

For a number of years, Mrs. Penley had owned and operated a Kentucky Fried Chicken franchise. She fell ill and obtained her husband’s full-time participation in the business. For ten years, the business was operated in the wife’s name, with the husband as an employee. In 1977, she decided to incorporate the business. In that connection, she orally promised her husband forty-eight percent of the shares of the proposed corporation (on the assumption she would also get forty-eight percent, their son the remaining four percent). The incorporation took place after the couple’s divorce. The wife refused to transfer forty-eight percent of the shares to the husband. He sued; the jury found that the husband was entitled to the shares.

The North Carolina Court of Appeals reversed.<sup>25</sup> Relying on the statutory definition of a preincorporation subscription,<sup>26</sup> the court

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22. R. BAKER & W. CARY, CASES AND MATERIALS ON CORPORATIONS 756–57 (unabridged 3d ed. 1959).

23. *White County Guar. Sav. & Loan Ass’n v. Searey Fed. Sav. & Loan Ass’n*, 241 Ark. 878, 410 S.W.2d 760, 763 (1967); see also *Molina*, 465 P.2d at 294 (in the absence of statute, “no particular form is required if the intent of the parties can be collected from the writing”).

24. 65 N.C. App. 711, 310 S.E.2d 360 (1984), *rev’d*, 314 N.C. 1, 332 S.E.2d 51 (1985). Another recent case with similar facts is *Zukowski v. Dunton*, 650 F.2d 30 (4th Cir. 1981).

25. *Penley*, 310 S.E.2d at 368.

26. N.C. GEN. STAT. § 55-43(a) (1982) states that a preincorporation subscription is “a promise or contract to take shares in a corporation to be organized and to pay the agreed price thereof to the corporation or others for its benefit.”

concluded that the agreement was essentially a preincorporation subscription, and as such, was unenforceable for lack of a writing.<sup>27</sup> The North Carolina Supreme Court reversed, reinstating the trial court's verdict for the husband. With respect to the subscription issue, the court said that the action was not one in which the wife was attempting to enforce the husband's promise to *take* shares. The action instead was an attempt by the husband to enforce the wife's promise to *issue* shares to the husband.<sup>28</sup>

Restated, the supreme court apparently concluded that the ultimate question in the case was whether the husband had acquired a property interest in the franchise prior to the oral agreement. The court implies that had the husband acquired such an interest, the agreement would have been considered a subscription—apparently because the husband would have been a transferor of property to the corporation for shares. The court concluded that the husband had not acquired an interest in the franchise before the agreement. Thus, it held that only the wife could enter into a subscription agreement with the corporation exchanging the franchise for shares, and that the husband's rights came only from her oral agreement to transfer some of the shares to be received on completion of her subscription to him.

This analysis is similar to that involved in certain tax questions arising from transfers of property to a controlled corporation.<sup>29</sup> One cannot escape the feeling that form is critical to such transactions, and that careful drafting and documentation are a must whenever subscriptions are used in the incorporation of a going business.<sup>30</sup>

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27. *Penley*, 310 S.E.2d at 365. The court also held that even if the agreement could be characterized as a shareholder's agreement for the corporation to be formed, it would be unenforceable for lack of a writing under N.C. GEN. STAT. § 55-73(b) (1982).

28. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51, 63 (1985). The court considered the husband to have elected to pursue his claim upon the oral agreement to convey an interest in the corporation. Thus, it did not view the agreement as a shareholders' agreement. The shareholder agreement issues in the case are discussed in Note, *Shareholder Agreements—Oral Agreements in Close Quarters*, 72 WAKE FOREST L. REV. 147 (1987).

29. I.R.C. § 351 (1986) requires for nonrecognition of gain that transferors of property to a corporation must receive only stock or securities and must be in control of the corporation immediately after the transfer. The issue of whether a person designated under various arrangements to receive shares in a new corporation is a transferor of property has arisen with some frequency. See B. BITTKER & J. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* 3-42 to 3-43 (4th ed. 1979).

30. Thus, as in the tax area, it may be best to have a conveyance of an undivided interest in the business to be incorporated prior to entering into subscriptions.

## C. *Writing Requirements*

Counsel preparing subscription agreements should be aware of statutory requirements that subscriptions must be written, and of the legal uncertainties that prevail in the absence of a writing. Fourteen states have statutes that provide that a subscription for stock (made before or after incorporation) may not be enforced against the subscriber unless in writing and signed by the subscriber.<sup>31</sup> Five more states have statutes that provide that at least certain subscriptions will not be valid if not in writing.<sup>32</sup> Texas and Utah define a subscription in part to be a memorandum in writing.<sup>33</sup>

The remaining states, following the lead of the Model Business Corporation Act<sup>34</sup> and the Revised Model Business Corporation Act,<sup>35</sup> have no corporation statute requiring that subscriptions be written. Such a requirement may nevertheless be imposed by other statute of frauds provisions operative in those jurisdictions. Thus, the limited number of cases that have construed article 8-319 of the Uniform Commercial Code<sup>36</sup> have applied it to subscriptions for shares.<sup>37</sup> In addition, the most recent decisions reviewing the long-standing conflict<sup>38</sup> regarding the application of a state's general statute of frauds to

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31. ARIZ. REV. STAT. ANN. § 10-017(B) (1977); COLO. REV. STAT. § 7-4-103(5) (1986); DEL. CODE ANN. tit. 8, § 166 (1983); FLA. STAT. ANN. § 607.051(2) (West 1977); GA. CODE ANN. § 14-2-83(b) (1982); KAN. STAT. ANN. § 17-6416 (Supp. 1986); MICH. STAT. ANN. § 21.200(305)(1) (Callaghan 1983); MINN. STAT. ANN. § 302A.403(2) (West 1985); N.Y. BUS. CORP. LAW art. 5, § 503(b) (McKinney 1986); N.D. CENT. CODE § 10-19.1-62(1) (1985); OKLA. STAT. ANN. tit. 18, § 1047 (West 1987); and S.C. CODE ANN. § 33-9-60(b) (Law. Co-op. 1987) contain provisions substantially identical to the text. N.J. STAT. ANN. § 14A:7-3(2) (West 1987) provides that a subscription agreement will not be enforceable unless it satisfies the requirements in N.J. STAT. ANN. § 12A:8-319 with respect to a contract for sale of securities. (The statute of frauds provision in article 8 of the U.C.C. (article 8-319) is discussed in text immediately following.) NEV. REV. STAT. § 78.225 (1967) provides that only a written contract of subscription for stock gives rise to personal liability of the subscriber for unpaid amounts.

32. Unless otherwise noted, the statutes require that both preincorporation and postincorporation subscriptions be written. IDAHO CODE § 30-1-17 (1980) (only preincorporation subscriptions); LA. REV. STAT. ANN. § 12:71(A) (West 1969); ME. REV. STAT. ANN. tit. 13A, § 505(1) (1981); N.C. GEN. STAT. § 55-43(b) (1982); WASH. REV. CODE § 23A.08.140 (1985) (only preincorporation subscriptions).

33. TEX. BUS. CORP. ACT ANN. art. 1.02(5) (Vernon 1980); UTAH CODE ANN. § 16-10-2(18) (1987 & Supp. 1987).

34. See MODEL BUSINESS CORP. ACT § 17 (1969).

35. See REVISED MODEL BUSINESS CORP. ACT § 6.20 (1984).

36. U.C.C. § 8-319 (1977) (Statute of Frauds).

37. See *Putnam v. Williams*, 652 F.2d 497, 501 (5th Cir. 1981) (by implication); *Cooper v. Vitracco, Inc.*, 320 F. Supp. 239 (D.V.I. 1970).

38. Compare *Peninsula Leasing Co. v. Cody*, 126 N.W. 1053 (Mich. 1910) (holding subscriptions not within the general statute of frauds) with *Spencer v. McGuffin*, 190 Ind. 308, 130 N.E. 407 (1921) (holding subscriptions within the general statute of frauds).



subscriptions have decided in favor of application.<sup>39</sup>

A final matter highlighted by recent decisions is the uncertainty that arises when a subscription does not comply with a writing requirement. Thus, the court of appeals' decision in *Penley v. Penley* interpreted statutory language that an oral agreement was invalid to mean that the subscriber had no right to enforce the agreement.<sup>40</sup> On the other hand, a New York case interpreted a provision declaring that a subscription for shares would not be enforceable unless written to mean that the lack of a writing would be a defense against enforcement by the corporation of the subscription. The lack of a writing, however, would not preclude the subscriber from suing the corporation for rights under the subscription.<sup>41</sup> Yet another case interpreted language in the Texas definition of a stock subscription ("a memorandum in writing"<sup>42</sup>) to mean that the rights of a subscriber desiring to enforce an oral agreement were to be determined under general contract law, rather than under the corporation statute.<sup>43</sup> Finally, there are relatively recent decisions upholding oral subscriptions with no discussion of the statute of frauds issue.<sup>44</sup>

### III. EFFECT OF PREINCORPORATION SUBSCRIPTIONS

The courts in early cases involving the effect of preincorporation subscriptions received no help from state corporation statutes. Searching for doctrinal precepts, they turned to contract law principles of offer, acceptance and consideration.<sup>45</sup> Those concepts led a majority of courts to conclude that a preincorporation subscription was a continuing offer by the subscriber which could be revoked at any time prior to the formation of the corporation and acceptance by it of the

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39. See *Cooper v. Vitracco, Inc.*, 320 F. Supp. 239 (D.V.I. 1970).

40. *Penley v. Penley*, 65 N.C. App. 711, 310 S.E.2d 360, 365 (1984), *rev'd on other grounds*, 314 N.C. 1, 332 S.E.2d 51 (1985).

41. *Beck v. Motler*, 42 A.D.2d 1020, 348 N.Y.S.2d 397, 399 (1973). To the same effect are *Putnam v. Williams*, 652 F.2d 497 (5th Cir. 1981) (interpreting similar Georgia statute); *Super Valu Stores, Inc. v. First Nat'l Bank*, 463 F. Supp. 1183 (M.D. Ga. 1979) (same, with qualification that once stock had been issued, suit was permissible against the subscriber). See also *Duncan v. Brookview House, Inc.*, 262 S.C. 449, 205 S.E.2d 707 (1974) (despite statute making oral subscriptions unenforceable, oral subscription enforced against subscriber on grounds that active role in formation and operation of the corporation estopped such defense).

42. TEX. BUS. CORP. ACT ANN. art. 1.02(5) (Vernon 1980).

43. *Jatoi v. Park Center, Inc.*, 616 S.W.2d 399 (Tex. Ct. App. 1981).

44. *E.g., Bielinski v. Miller*, 118 N.H. 26, 382 A.2d 357 (1978).

45. See H. BAIANTINE, *CORPORATIONS* 444-45 (rev. ed. 1946) (argues such concepts were inadequate to provide a sensible answer to the business problems giving rise to preincorporation subscriptions).

subscription.<sup>46</sup> A minority of courts used the same principles to conclude that subscriptions entered by a number of subscribers resulted in a contract between the subscribers that the subscriptions would not be revoked. Under this view, the subscriptions were irrevocable offers to the corporation unless cancelled by the consent of all subscribers before acceptance by the corporation.<sup>47</sup>

These common law principles are relevant today in only a handful of states.<sup>48</sup> The vast majority of state corporation statutes have adopted rules modeled on the minority common law position: preincorporation subscriptions are irrevocable for a stated period (typically six months), unless otherwise provided by the subscription or unless all of the subscribers consent to the revocation of the subscription.<sup>49</sup>

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46. *Collins v. Morgan Grain Co.*, 16 F.2d 253 (9th Cir. 1926), contains a classic statement of the analysis. For a more recent application, see *Brown v. United Community Nat'l Bank*, 282 F. Supp. 781 (D.D.C. 1968).

47. *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 41 N.W. 1026 (1889), is the classic statement of this position.

48. California, Connecticut, Maryland, Massachusetts, Missouri, Ohio, and Pennsylvania have no statute making preincorporation subscriptions irrevocable.

49. The statement in text is a paraphrase of the provision in MODEL BUSINESS CORP. ACT § 17 (1969) (which states a period of six months). REVISED MODEL BUSINESS CORP. ACT § 6.20(a) (1984) (which also states a period of six months) is similar, except that the first unless clause says "unless the subscription agreement provides a longer or shorter period . . . ."

The following 39 states and the District of Columbia have provisions similar to the text statement and a stated period of six months: ALA. CODE § 10-2A-34 (1980); ALASKA STAT. § 10.05.087 (1985); ARK. STAT. ANN. § 64-605A (Supp. 1987) (Revised Model Act provision); COLO. REV. STAT. § 7-4-103(1) (1986); DEL. CODE ANN. tit. 8, § 165 (1983) (adds subscription may be revoked by consent of corporation); D.C. CODE ANN. § 29-315(a) (1981); FLA. STAT. ANN. § 607.051(1) (West 1977); GA. CODE ANN. § 14-2-83(a) (1982); HAW. REV. STAT. § 415-17 (1985); IDAHO CODE § 30-1-17 (1980); ILL. ANN. STAT. ch. 32, para 6.20 (Smith-Hurd 1985); IND. CODE ANN. § 23-1-26-1 (Burns Supp. 1987) (Revised Model Act provision); IOWA CODE ANN. § 496A.16 (West 1962); KAN. STAT. ANN. § 17-6415 (1981) (adds subscription may be revoked with consent of corporation and states section does not limit defenses available in an action for enforcement of a contract); KY. REV. STAT. ANN. § 271A.085(1) (Baldwin 1983); ME. REV. STAT. ANN. tit. 13-A, § 505(1) (1981) (also applies to postincorporation subscriptions); MICH. STAT. ANN. § 21.200(305)(2) (Callaghan 1985); MINN. STAT. ANN. § 302A.403(2) (West 1985) (also applies to post incorporation subscriptions; restates the unless clauses to read "unless the subscription agreement provides for, or unless all of the subscribers consent to, an earlier revocation"); MISS. CODE ANN. § 79-3-31 (1972); MONT. CODE ANN. § 35-1-603(1) (1985); NEB. REV. STAT. § 21-2016 (1983); NEV. REV. STAT. § 78.220(4) (1967); N.H. REV. STAT. ANN. § 293-A:17(I) (Supp. 1986); N.J. STAT. ANN. § 14A:7-3(1) (West Supp. 1987) (adds to six month period "if no certificate of incorporation shall be filed within such period" and provides 60 day period of irrevocability following incorporation); N.M. STAT. ANN. § 53-11-17 (Supp. 1987); N.C. GEN. STAT. § 55-43(c) (1982); N.D. CENT. CODE § 10-19.1-62(2) (1985) (same as Minnesota); OKLA. STAT. ANN. tit. 18, § 1046 (West Supp. 1987); R.I. GEN. LAWS § 7-1.1-16(a) (1985); S.C. CODE ANN. § 33-9-60(a) (Law. Co-op. 1987); S.D. CODIFIED LAWS ANN. § 47-3-19 (1983); TENN. CODE ANN. § 48-6-201(a) (1984) (Revised Model Act provisions); TEX. BUS. CORP. ACT. ANN. art. 2.14A (Vernon 1980); UTAH CODE ANN. § 16-10-16 (1987); VT. STAT. ANN. tit. 11, § 1864(a) (1984); VA. CODE ANN. § 13.1-642A (1985) (Revised Model Act provision); WASH. REV. CODE ANN. § 23A.08.140 (1987); W. VA. CODE § 31-1-80 (1982); WIS.

Counsel advising clients regarding preincorporation subscriptions for a corporation to be formed in the handful of states without statutory provisions must, of course, determine the state court's position on the disputed rules.<sup>50</sup> If the jurisdiction adheres to the majority position,<sup>51</sup> or if the issue is in doubt,<sup>52</sup> counsel must then evaluate the risk presented in the proposed transaction by possible revocation of preincorporation subscriptions. If the risk is significant, counsel may wish to reconsider the use of preincorporation subscriptions (as against incorporating first and then arranging for subscriptions) or the use of numerous devices suggested by commentators to avoid the risk of revocation of preincorporation subscriptions.<sup>53</sup>

#### IV. ACCEPTANCE OF SUBSCRIPTIONS

The courts' use of contract principles to resolve subscription controversies early led to the requirement that a subscriber's offer had to be accepted by the corporation before the subscriber was considered a shareholder and was liable for the subscription.<sup>54</sup> The requirement has produced a significant amount of litigation, primarily related to attempted revocations of preincorporation subscriptions, as to what actions by the corporation constituted "acceptance." A majority of the cases<sup>55</sup> considering the issue require either an express acceptance of the subscription by corporate agents,<sup>56</sup> or conduct by such persons

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STAT. ANN. § 180.13(1) (West 1957); WYO. STAT. § 17-1-114(a) (West 1987); Oregon Business Corporation Act, ch. 52, § 37(1), 1987 Or. Laws 43, 51 (Revised Model Act provision).

Two states, Maryland and New York, provide a period of irrevocability of three months. MD. CORPS. & ASS'NS CODE ANN. § 2-202(a) (1985); N.Y. BUS. CORP. LAW § 503(a) (McKinney 1986). Two other states, Arizona and Louisiana, provide a period of irrevocability of one year. ARIZ. REV. STAT. ANN. § 10-017A (1977); LA. REV. STAT. ANN. § 12:71B (West 1969).

50. The cases are discussed in 4 W. FLETCHER, *supra* note 18, §§ 1424-1427; Schwenk, *supra* note 18.

51. Prominent examples of decisions adhering to the majority position by courts in states without statutes are Moser v. Western Harness Racing Ass'n, 89 Cal. App. 2d 1, 200 P.2d 7 (1948); Hudson Real Estate Co. v. Tower, 156 Mass. 82, 30 N.E. 465 (1892).

52. An additional concern may be presented by dictum in Hidell v. International Diversified Inv., 520 F.2d 529 (7th Cir. 1975). The court said that a subscription for shares not authorized by the articles of incorporation filed by the corporation is no longer binding on the subscriber or the corporation, despite the Illinois statute making preincorporation subscriptions irrevocable for six months. The authority cited for this proposition predated the Illinois statute. Thus, the dictum seems questionable.

53. See C. ROHRICH, ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES § 5.07[1] (5th ed. 1975).

54. *E.g.*, Bryant's Pond Steam-Mill Co. v. Felt, 87 Me. 234, 32 A. 888 (1895).

55. See 4 W. FLETCHER, *supra* note 18, § 1406.

56. Recent examples include United States v. Parker, 376 F.2d 402 (5th Cir. 1967) (directors' resolution stated acceptance); Brown v. United Community Nat'l Bank, 282 F. Supp. 781

that implies acceptance.<sup>57</sup> A much smaller group of cases holds, in accord with the commentators' view,<sup>58</sup> that acceptance can be shown simply by formation of the corporation.<sup>59</sup> It is generally agreed that no notice of the acceptance need be given to the subscriber unless required by the terms of the subscription.<sup>60</sup>

A limited number of states address the issue of acceptance by statute. Four states provide that the filing of articles of incorporation by the secretary of state shall constitute acceptance by the corporation of preincorporation subscriptions.<sup>61</sup> Three states require or imply that directors or other corporate agents must accept preincorporation subscriptions in order for the subscriptions to be binding on subscribers.<sup>62</sup> In addition, three states require that directors or corporate agents must accept postincorporation subscriptions.<sup>63</sup>

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(D.D.C. 1968) (corporation wrote letter saying its board of directors had allocated shares to plaintiff's subscription).

57. Recent examples include *Molina v. Largosa*, 51 Haw. 507, 465 P.2d 293 (1970) (explicitly rejects acceptance as a result of formation of the corporation; found acceptance by corporation in the listing of Molina's name in affidavit of subscribers filed on incorporation); *Becker v. Tower Nat'l Life Inv. Co.*, 406 S.W.2d 553 (Mo. 1966) (acceptance found in course of conduct of corporation); *Cornhusker Dev. & Inv. Group v. Knecht*, 180 Neb. 87, 146 N.W.2d 567 (1966) (approves implied acceptance by recognizing subscriber as a shareholder); *Bielinski v. Miller*, 118 N.H. 26, 382 A.2d 357 (1978) (acceptance found from listing of plaintiff as a shareholder on the corporation's tax returns).

58. *E.g.*, H. BALLANTINE, *supra* note 45, at 447-48.

59. *See, e.g.*, *Moser v. Western Harness Racing Ass'n*, 89 Cal. App. 2d 1, 200 P.2d 7 (1948); *Samia v. Central Oil Co.*, 339 Mass. 101, 158 N.E.2d 469 (1959) (by implication).

60. *E.g.*, *Hawley v. Upton*, 102 U.S. 314 (1880).

61. ILL. ANN. STAT. ch. 32, para. 6.20 (1985); LA. REV. STAT. ANN. § 12:71C (West 1969) (after corporate existence has begun, subscriptions may be enforced by the corporation); PA. STAT. ANN. tit. 15, § 1207 (Purdon 1967) (subscribers shall be shareholders); TEX. BUS. CORP. ACT ANN. art. 2.14B (Vernon 1980) (acceptance only of subscriptions on list filed with articles of incorporation; failure to include a preincorporation subscription therein is rejection). The Louisiana statute was interpreted by the court in *Prejean v. Commonwealth for Community Change, Inc.*, 503 So.2d 661 (La. Ct. App. 1987), to mean that on incorporation, preincorporation subscriptions will no longer be revocable absent grounds for rescission.

62. MO. ANN. STAT. § 351.175(1) (Vernon Supp. 1987) (directors have power to accept or reject subscriptions); N.J. STAT. ANN. § 14A:7-3(1) (West Supp. 1987) (subscriptions must be accepted or rejected by directors, unless articles of incorporation or bylaws require shareholder action); N.C. GEN. STAT. § 55-43(b) (1982) (subscription becomes enforceable upon acceptance by the corporation).

63. MO. ANN. STAT. § 351.175(1) (Vernon 1987) (directors have power to accept or reject subscriptions); N.J. STAT. ANN. § 14A:7-3(1) (West 1987) (subscriptions must be accepted or rejected by directors, unless articles of incorporation or bylaws require shareholder action); TEX. BUS. CORP. ACT ANN. art. 2.14C (Vernon 1980) (acceptance must be by director's resolution or by written memorandum of acceptance executed by person authorized by directors and delivered to subscriber).

## V. POSTINCORPORATION SUBSCRIPTIONS

Most of the litigation involving postincorporation subscriptions has centered on one question: when did the subscriber become entitled to the rights,<sup>64</sup> or subject to the obligations,<sup>65</sup> of a shareholder? Generally, the answer is that the subscriber becomes a shareholder when the subscription offer is accepted.<sup>66</sup> Such result is not affected by evidence that the subscription is not yet paid<sup>67</sup> (at least in the absence of laches).<sup>68</sup> Nor is such result affected by the failure of the corporation to issue certificates for the subscribed shares.<sup>69</sup>

The general rule is, however, subject to a major exception if the law of the state of incorporation accepts the executory contract doctrine. The doctrine, articulated in *Stern v. Mayer*,<sup>70</sup> confines subscriptions to purchases in which the parties' intent is to make the purchaser a

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64. Subscribers have asserted diverse shareholders' rights: First, the right to examine corporate books (*Babbitt v. Pacco Investors Corp.*, 246 Or. 26, 425 P.2d 489 (1967)); second, the right to transfer the shares to be received (*Van Noy v. Gibbs*, 7 Utah 2d 70, 318 P.2d 351 (1957)); third, the right to bring a derivative action (*Norris v. Osburn*, 243 Ga. 483, 254 S.E.2d 860 (1979)); *Rank v. Lease Assocs., Inc.*, 45 Wis. 689, 173 N.W.2d 713 (1970)); and fourth, the rights to vote on a sale of assets and initiate a dissolution action (*Golden v. Oahe Enters., Inc.*, 90 S.D. 263, 240 N.W.2d 102 (1976)). See also *United States v. Parker*, 376 F.2d 402 (5th Cir. 1967) (question of whether shares to be issued on a subscription counted as outstanding shares for purposes of I.R.C. § 1239 (1954)).

For a comparison, see *Redemer v. Hollis*, 347 So.2d 48 (La. Ct. App. 1977) (subscriber who had paid subscription price was not a registered owner of shares, and thus was not entitled to inspect corporate books where corporation had no authorized, unissued shares available).

65. E.g., *Martin v. Schuler*, 573 P.2d 260 (Okla. 1977).

66. E.g., H. BALLANTINE, *supra* note 45, at 450. As Ballantine notes, a corporation may solicit subscriptions by means of an offer of shares to any person who will subscribe. In such a case, the act of the subscriber making the subscription is the acceptance. E.g., *Smith v. General Motors Corp.*, 289 F. 205 (6th Cir. 1923). In the more typical case of a corporation soliciting subscribers for offers to the corporation, acceptance generally comes by corporate action. However, in some jurisdictions, the acceptance must be communicated to the subscriber in order to be effective. See *Jatoi v. Park Center, Inc.*, 616 S.W.2d 399 (Tex. Ct. App. 1981).

67. E.g., *Babbitt v. Pacco Investors Corp.*, 246 Or. 261, 425 P.2d 489 (1967).

68. Compare *Welborne v. Preferred Risk Ins. Co.*, 232 Ark. 828, 340 S.W.2d 586 (1960); *Gerber v. Ty-Data, Inc.*, 5 Mass. App. Ct. 898, 370 N.E.2d 445 (1977) and *Buchele v. Pinehurst Surgical Clinic, P.A.*, 80 N.C. App. 256, 341 S.E.2d 772 (1986), *aff'd*, 318 N.C. 503, 349 S.E.2d 579 (1986) with *Prejean v. Commonwealth for Community Change, Inc.*, 503 So.2d 661 (La. Ct. App. 1987) (laches held inapplicable despite passage of nine years from date of incorporation) and *Goldstein v. Widett*, 360 Mass. 126, 272 N.E.2d 220 (1971) (subscriber permitted to enforce a four-year-old subscription; subscriber had not abandoned subscription and projects were very slow in getting started).

69. E.g., *Rank v. Lease Assocs.*, 45 Wis. 2d 689, 173 N.W.2d 713 (1970). However, as the court notes, some statutes require that only registered shareholders are eligible to bring a derivative action. Thus, the court denied the subscribers' right to bring such an action.

70. 166 Minn. 346, 207 N.W. 737 (1926). Other cases taking the executory contract view are: *Burke v. Walker*, 124 N.J. Eq. 141, 200 A. 546 (1938); *Boroseptic Chem. Co. v. Nelson*, 53 S.D. 546, 221 N.W. 264 (1928). *Crichfield-Loeffler, Inc. v. Taverna*, 4 N.J. Misc. 310, 132 A. 494 (1926), decided three days before *Stern v. Mayer*, held that a postincorporation agreement to

shareholder prior to full performance of the purchase agreement. If the agreement demonstrates that the parties' intent is to preclude exercise of significant shareholder rights until full performance,<sup>71</sup> the agreement is said to be an executory contract for sale of stock. Once that determination is made, the subscriber does not become a shareholder until the full purchase price has been paid,<sup>72</sup> the corporation loses the right to collect unpaid installments in the event of insolvency,<sup>73</sup> and the corporation may be limited on suits for default in payment of installments to the fair market value of the shares.<sup>74</sup>

Developments since the decision in *Stern v. Mayer* appear to leave the executory contract doctrine operative in only a few jurisdictions. Three states have adopted statutes that explicitly reject the executory contract doctrine.<sup>75</sup> Language in the Model Business Corporation Act,<sup>76</sup> and numerous other statutes,<sup>77</sup> has been interpreted<sup>78</sup> to change at least certain aspects of the doctrine. The Revised Model Business Corporation Act subjects subscription agreements entered into after incorporation to its provisions regulating share issuance and subscriber's liability therefor.<sup>79</sup> Such provision thus appears to abolish the executory contract doctrine.<sup>80</sup> No case since 1940 appears to have applied the doctrine. Indeed, the doctrine was explicitly rejected in

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purchase shares was an executory contract (rather than a subscription) because the agreement did not negate the possibility that the shares involved were treasury shares.

71. The court in *Stern v. Mayer*, 166 Minn. 346, 207 N.W. 737 (1926), found such intent in the name of the instrument ("application for stock" instead of "subscription"), lack of facts indicating the corporation intended to consider the purchaser as a shareholder prior to receipt of payment, annual installments (instead of calls at discretion of directors), reservation of option to forfeit, and inclusion of interest on unpaid installments in the agreement.

72. *E.g.*, *Boroseptic Chem. Co. v. Nelson*, 53 S.D. 546, 221 N.W. 264 (1928).

73. *E.g.*, *Stern v. Mayer*, 166 Minn. 346, 207 N.W. 737 (1926).

74. *E.g.*, *Crichfield-Loeffler, Inc. v. Taverna*, 4 N.J. Misc. 310, 132 A. 494 (1926).

75. MICH. STAT. ANN. § 21.200(305)(3) (Callaghan 1983); N.J. STAT. ANN. § 14A:7-3(7) (West Supp. 1987); N.C. GEN. STAT. § 55-43(a) (1982). The latter thus reverses the results in *Burke v. Walker*, 124 N.J. Eq. 141, 200 A. 546 (1938), and *Crichfield-Loeffler, Inc. v. Taverna*, 4 N.J. Misc. 310, 132 A. 494 (1926).

76. MODEL BUSINESS CORP. ACT § 17 (1969).

77. *E.g.*, N.Y. BUS. CORP. LAW § 503(c) (McKinney 1986).

78. *Penn-Allen Broadcasting Co. v. Traylor*, 389 Pa. 490, 133 A.2d 528 (1957). The court holds that the statutory language "[u]nless otherwise provided in the subscription agreement, subscriptions for shares, whether made before or after the organization of the corporation, shall be paid . . . as . . . determined by the board of directors . . ." changed prior case law and meant that postincorporation subscriptions had to be paid in full despite a drop in market value.

79. REVISED MODEL BUSINESS CORP. ACT § 6.20(e) (1984).

80. The Committee Comment makes no reference to such effect. Indeed, the Comment stresses that postincorporation subscriptions are contracts between the subscriber and the corporation, and that they may contain mutually acceptable provisions subject to section 6.21. MODEL BUSINESS CORP. ACT ANN. § 347 (3d ed. 1985). Nevertheless, the Committee's reference to section 6.21 brings with it liability to pay the consideration for which the shares were

the latest case in which it was asserted, *Martin v. Schuler*,<sup>81</sup> and it has been implicitly rejected by a large number of subscription cases.<sup>82</sup>

In the few states in which the executory contract doctrine still applies, counsel planning postincorporation subscriptions must be prepared to draft agreements that fully set out the subscriber's, and the corporation's, rights and obligations.

## VI. ENFORCEMENT OF SHARE SUBSCRIPTIONS

### A. *Setting Terms of Payment and Making Calls*

With the exception of California,<sup>83</sup> all states and the District of Columbia have statutes related to the process of setting payment terms for subscriptions and making a call for such payments.<sup>84</sup> Following

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authorized to be issued (under section 6.22). Such result is a rejection of the executory contract doctrine.

81. 573 P.2d 260 (Okla. 1977). Earlier cases disagreeing with *Stern* appear in H. BALLANTINE, *supra* note 45, at 452-53.

82. See cases in Comment, *supra* note 1, and *Sprangers v. Interactive Technologies, Inc.*, 394 N.W.2d 498 (Minn. Ct. App. 1986) (postincorporation letter agreement for the purchase of shares upon the completion of a public offering interpreted as stock purchase agreement; purchaser held to be a shareholder at time when company accepted payments under the agreement).

83. Discussion of the changes made by the 1977 revision of the California Corporations Code and of the California common law appear in 1 H. MARSH, CALIFORNIA CORPORATION LAW § 5.23 (2d ed. 1986); see also H. BALLANTINE & G. STERLING, CALIFORNIA CORPORATION LAWS § 44 (4th ed. 1987).

84. ALA. CODE § 10-2A-34 (1980); ALASKA STAT. § 10.05.090 (1985); ARIZ. REV. STAT. ANN. § 10-017C (1977); ARK. STAT. ANN. § 64-605B (1980); COLO. REV. STAT. § 7-4-103(2) (1986); CONN. GEN. STAT. ANN. § 33-342(a) (West Supp. 1987); DEL. CODE ANN. tit. 8, § 163 (1983) (see note below); D.C. CODE ANN. § 29-315(b) (1981); FLA. STAT. ANN. § 607.051(3) (West 1977); GA. CODE ANN. § 14-2-83(c) (1982); HAW. REV. STAT. § 415-17 (1985); IDAHO CODE § 30-1-17 (1980); ILL. ANN. STAT. ch. 32, para. 6.20 (Smith-Hurd 1985); IND. CODE ANN. § 23-1-26.1(b) (West Supp. 1987); IOWA CODE ANN. § 496A.16 (West 1962); KAN. STAT. ANN. § 17-6413 (1981); KY. REV. STAT. ANN. § 271A.085(2) (Baldwin 1983); LA. REV. STAT. ANN. § 12:71D (West 1969); ME. REV. STAT. ANN. tit. 13-A, § 505(3) (1981); MD. CORPS. & ASS'NS CODE ANN. § 2-202(c) (1985); MASS. ANN. LAWS ch. 156B, § 22 (Law. Co-op. 1979); MICH. STAT. ANN. § 21.200(306) (Callaghan 1983); MINN. STAT. ANN. § 302A.403(3) (West 1985); MISS. CODE ANN. § 79-3-31 (1972); MO. ANN. STAT. § 351.175(2) (Vernon 1987); MONT. CODE ANN. § 35-1-603(2) (1985); NEB. REV. STAT. § 21-2016 (1983); NEV. REV. STAT. § 78-220(1) (1967); N.H. REV. STAT. ANN. § 293-A:17(II) (Supp. 1986); N.J. STAT. ANN. § 14A:7-3(4) (West Supp. 1987); N.M. STAT. ANN. § 53-11-17 (1978); N.Y. BUS. CORP. LAW § 503(c) (McKinney 1986); N.C. GEN. STAT. § 55-43(g) (1982); N.D. CENT. CODE § 10-19.1-62(3) (1985); OHIO REV. CODE ANN. § 1701.20(A) (Anderson 1985); OKLA. STAT. ANN. tit. 18, § 1044 (West 1987); PA. STAT. ANN. tit. 15, § 1604 (Purdon 1967); R.I. GEN. LAWS § 7-1.1-16(b) (1985); S.C. CODE ANN. § 33-9-60(c) (Law. Co-op. 1987); S.D. CODIFIED LAWS ANN. § 47-3-20 (1983); TENN. CODE ANN. § 48-6-201(b) (1984); TEX. BUS. CORP. ACT ANN. art. 2.14D (Vernon 1980); UTAH CODE ANN. § 16-10-16 (1987); VT. STAT. ANN. tit. 11, § 1864(b) (1984); VA. CODE ANN. § 13.1-642B (1985); WASH. REV. CODE ANN. § 23A.08.140 (1987); W.

the lead of the Model Business Corporation Act<sup>85</sup> and the Revised Model Business Corporation Act,<sup>86</sup> all of these statutes empower the corporation's board of directors to determine the payment terms for subscriptions, unless the subscription specifies terms. Most of these statutes<sup>87</sup> require that directors' calls for payment must be uniform<sup>88</sup> as to all shares of the same class, or as to shares of the same series.<sup>89</sup> The statutes in a few states<sup>90</sup> specify the notice to be given in connection with the call, thereby settling the conflict in the case law as to whether notice is required when the subscription, the corporation's articles of incorporation, or its bylaws make no mention of it.<sup>91</sup> The noticeable impact of these statutes is an almost complete absence of cases involving calls in recent years.<sup>92</sup>

## B. Corporate Remedies in the Event of Default

With the exception of California and Iowa, all states and the District of Columbia have statutes specifying corporate remedies in the

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VA. CODE § 31-1-80 (1982); WIS. STAT. ANN. § 180.13(2) (West 1957); WYO. STAT. § 17-1-114(b) (1987); Oregon Business Corporation Act, ch. 52, § 37(2), 1987 Or. Laws 43, 51.

The Delaware provision cited above, section 163, as well as the Kansas and Oklahoma provisions, empowers directors to demand payment for unpaid shares. Similar language in an earlier Delaware statute was applied by the court in *Louisiana Oil Exploration Co. v. Raskob*, 32 Del. 564, 127 A. 713 (1925), to an unpaid subscription for shares.

85. MODEL BUSINESS CORP. ACT § 17 (1969).

86. REVISED MODEL BUSINESS CORP. ACT § 6.20(b) (1984).

87. The following statutes do not require that calls be uniform: CONN. GEN. STAT. ANN. § 33-342(a) (West 1987); DEL. CODE ANN. tit. 8, § 163 (1983); KAN. STAT. ANN. § 17-6413 (1981); MASS. ANN. LAWS ch. 156B, § 22 (Law. Co-op. 1979); OHIO REV. CODE ANN. § 1701.20(A) (Anderson 1985); OKLA. STAT. ANN. tit. 18, § 1044 (West 1986).

88. REVISED MODEL BUSINESS CORP. ACT § 6.20(b) (1984); ARK. STAT. ANN. § 64-605B (1980); IND. CODE ANN. § 23-1-26-1(b) (Burns 1987); TENN. CODE ANN. § 48-6-201(b) (1984); VA. CODE ANN. § 13.1-642B (1985); and Oregon Business Corporation Act, ch. 52, § 37(2), 1987 Or. Laws 43, 51, require that calls be "uniform so far as practicable."

89. REVISED MODEL BUSINESS CORP. ACT § 6.20(b) (1984), and the statutes in the following states, permit the subscription agreement to state that calls will not be uniform: ARK. STAT. ANN. § 64-605B (1980); FLA. STAT. ANN. § 607.051(3)(b) (West 1977); GA. CODE ANN. § 14-2-83(c)(2) (1982); IND. CODE ANN. § 23-1-26-1(b) (Burns 1987); N.J. STAT. ANN. § 14A:7-3(4)(b) (West Supp. 1987); TENN. CODE ANN. § 48-6-201(b) (1984); VA. CODE ANN. § 13.1-642B (1985); Oregon Business Corporation Act, ch. 52, § 37(2), 1987 Or. Laws 43, 51.

90. CONN. GEN. STAT. ANN. § 33-342(a) (West 1987) (notice per bylaws; otherwise reasonable); DEL. CODE ANN. tit. 8, § 163 (1983) (written notice at least 30 days prior to required payment); MD. CORPS. & ASS'NS CODE ANN. § 2-202(c)(2) (1985) (10 days written notice); MASS. ANN. LAWS ch. 156B, § 22 (Law. Co-op. 1979) (notice mailed at least seven days before payment is due); N.J. STAT. ANN. § 14A:7-3(4)(c) (West Supp. 1987) (30 days notice); OKLA. STAT. ANN. tit. 18, § 1044 (West 1986) (same as Delaware); PA. STAT. ANN. tit. 15, § 1604 (Purdon 1967) (personal or mailed notice at least 30 days before payment is due).

91. The cases are discussed in 4 W. FLETCHER, *supra* note 18, § 1816.

92. See, however, *Doyle v. Chladek*, 240 Or. 598, 403 P.2d 381 (1965), involving the date on which a call was deemed to have occurred for purposes of calculating interest.



event of default in the payment of any call.<sup>93</sup> Almost all of these statutes,<sup>94</sup> the Model Business Corporation Act,<sup>95</sup> and the Revised Model Business Corporation Act,<sup>96</sup> empower the corporation in the event of default to collect the amount owed as any other debt.<sup>97</sup> A number of statutes authorize the corporation to sell the shares subject to the subscription as an alternative to a debt action.<sup>98</sup> The Revised Model Business Corporation Act<sup>99</sup> provides as an alternative to a debt action that the corporation may rescind the subscription (unless the subscription

93. ALA. CODE § 10-2A-34 (1980); ALASKA STAT. § 10.05.093 (1985); ARIZ. REV. STAT. ANN. § 10-017C (1977); ARK. STAT. ANN. § 64-605D (1980); COLO. REV. STAT. § 7-4-103(3)-(4) (1986); CONN. GEN. STAT. ANN. § 33-342(b) (West Supp. 1987); DEL. CODE ANN. tit. 8, § 164 (1983); D.C. CODE ANN. § 29-315(b) (1981); FLA. STAT. ANN. § 607.051(4) (West 1977); GA. CODE ANN. § 14-2-83(d) (1982); HAW. REV. STAT. ACT. § 415-17 (1985); IDAHO CODE § 30-1-17 (1980); ILL. ANN. STAT. ch. 32, para. 6.20 (Smith-Hurd 1985); IND. CODE ANN. § 23-1-26.1(d) (West Supp. 1987); KAN. STAT. ANN. § 17-6414 (1981); KY. REV. STAT. ANN. § 271A.085(2) (Baldwin 1983); LA. REV. STAT. ANN. § 12:71E--71G (West 1969); ME. REV. STAT. ANN. tit. 13-A, § 505(4)-(5) (1981); MD. CORPS. & ASS'NS CODE ANN. § 2-206(c) (1985); MASS. ANN. LAWS ch. 156B, § 24 (Law. Co-op. 1979); MICH. STAT. ANN. § 21.200(307) (Callaghan 1983); MINN. STAT. ANN. § 302A.403(4) (West 1985); MISS. CODE ANN. § 79-3-31 (1972); MO. ANN. STAT. § 351.175(2) (Vernon Supp. 1987); MONT. CODE ANN. § 35-1-603(3) (1985); NEB. REV. STAT. § 21-2016 (1983); NEV. REV. STAT. § 78.220(2) (1967); N.H. REV. STAT. ANN. § 293-A:17(II) (Supp. 1986); N.J. STAT. ANN. § 14A:7-3(5)-(6) (West Supp. 1987); N.M. STAT. ANN. § 53-11-17 (Supp. 1987); N.Y. BUS. CORP. LAW § 503(d) (McKinney 1986); N.C. GEN. STAT. § 55-43(i) (1982); N.D. CENT. CODE § 10-19.1-62(4)-(5) (1985); OHIO REV. CODE ANN. § 1701.20(B) (Anderson 1985); OKLA. STAT. ANN. tit. 18, § 1045 (West 1986); PA. STAT. ANN. tit. 15, § 1605 (Purdon 1967); R.I. GEN. LAWS § 7-1.1-16(b) (1985); S.C. CODE ANN. § 33-9-60(d)-(e) (Law. Co-op. 1987); S.D. CODIFIED LAWS ANN. §§ 47-3-20 to -21 (1983); TENN. CODE ANN. § 48-6-201(d) (1984); TEX. BUS. CORP. ACT ANN. art. 2.14D (Vernon 1980); UTAH CODE ANN. § 16-10-16 (1987); VT. STAT. ANN. tit. 11, § 1864(b) (1984); VA. CODE ANN. § 13.1-642D to -642E (1985); WASH. REV. CODE ANN. § 23A.08.140 (1987); W. VA. CODE § 31-1-80 (1982); WIS. STAT. ANN. § 180.13(2) (West 1957); WYO. STAT. § 17-1-114(b) (1987); Oregon Business Corporation Act, ch. 52, § 37(4), 1987 Or. Laws 43, 51.

94. MASS. ANN. LAWS ch. 156B, § 24 (Law. Co-op. 1979) empowers the treasurer of the corporation to sell the subscription at public auction in the event of default. If the proceeds from such sale are less than the subscriber's debt, the corporation then may bring an action at law for the deficiency.

95. MODEL BUSINESS CORP. ACT § 17 (1969).

96. REVISED MODEL BUSINESS CORP. ACT § 6.20(d) (1984).

97. Connecticut and North Carolina recognize as an alternative the right of the corporation to sue for breach of the contract of subscription. CONN. GEN. STAT. ANN. § 33-342(b) (West Supp. 1987); N.C. GEN. STAT. § 55-43(i) (1982). Such result also apparently obtained under LA. REV. STAT. ANN. § 12:71C (West 1969). See *Moss v. Guarisco*, 409 So.2d 323 (La. Ct. App. 1982) (granting corporation right to specifically enforce a subscription).

98. CONN. GEN. STAT. ANN. § 33-342(b) (West Supp. 1987) (unless the subscription provides otherwise); DEL. CODE ANN. tit. 8, § 164 (1983); KAN. STAT. ANN. § 17-6414 (1981); LA. REV. STAT. ANN. § 12:71E--71F (West 1969) (unless the subscription provides otherwise); MICH. STAT. ANN. § 21.200(307)(1)(b) (Callaghan 1983); NEV. REV. STAT. § 78.220(2) (1967) (sufficient to pay subscriber's debt); N.J. STAT. ANN. § 14A:7-3(5)(b) (West Supp. 1987); OHIO REV. CODE ANN. § 1701.20B (Anderson 1985); OKLA. STAT. ANN. tit. 18, § 1045 (West 1986); PA. STAT. ANN. tit. 15, § 1605 (Purdon 1967).

99. REVISED MODEL BUSINESS CORP. ACT § 6.20(d) (1984).

provides otherwise) and sell the shares if the debt remains unpaid more than twenty days after written demand for payment by the corporation. A few statutes<sup>100</sup> authorize rescission as an alternative to action on the debt. Finally, a few statutes, as an alternative to a debt action, authorize the board of directors to declare the subscription and all previous payments forfeited.<sup>101</sup>

A large number of statutes<sup>102</sup> have adopted the provisions in section 17 of the Model Business Corporation Act related to forfeitures: That the bylaws may prescribe penalties for failure to pay calls; that a penalty working a forfeiture can only be declared if the amount due remains unpaid twenty days after written demand therefor; and that if shares are sold because of a forfeiture, any excess of the proceeds over the amount due shall be paid to the subscriber.<sup>103</sup> Four statutes permit the subscription agreement to prescribe penalties to pay calls,<sup>104</sup> another permits penalties stated in the agreement, the articles of incorporation, or the bylaws.<sup>105</sup> Finally, one statute<sup>106</sup> authorizes the corporation to forfeit a subscription if the corporation is unable to collect the amount due within six months after default.

The most significant recent litigation related to corporate remedies has, not surprisingly, dealt with forfeitures. The court in *Sweeney v.*

100. MICH. STAT. ANN. § 21.200(1)(c) (Callaghan 1983); N.J. STAT. ANN. § 14A:7-3(5)(c) (West Supp. 1987); N.C. GEN. STAT. § 55-43(j)(3) (1982).

101. LA. REV. STAT. ANN. § 12:71E (West 1969); MINN. STAT. ANN. § 302A.403(4)(a) (West 1985); N.Y. BUS. CORP. LAW § 503(d) (McKinney 1986); N.D. CENT. CODE § 10-19.1-62(4) (1985) (each statute requires prior notice to the subscriber: 15 days in Louisiana; 20 days in Minnesota; 30 days in New York). NEV. REV. STAT. § 78.220(2) (1967) states no penalty causing a forfeiture of a subscription may be declared unless the amount due remains unpaid for thirty days after written demand. It is not clear who is authorized to declare such a penalty.

102. ALA. CODE § 10-2A-34 (1980); ALASKA STAT. § 10.05.093 (1985); COLO. REV. STAT. § 7-4-103(3)-(4) (1986); D.C. CODE ANN. § 29-315(b) (1981); HAW. REV. STAT. § 415-17 (1985); IDAHO CODE § 30-1-17 (1980); ILL. ANN. STAT. ch. 32, para. 6.20 (Smith-Hurd 1985); KY. REV. STAT. ANN. § 271A.085(2) (Baldwin 1983); ME. REV. STAT. ANN. tit 13A, § 505(4)-(5) (1981); MISS. CODE ANN. § 79-3-31 (1972); MO. ANN. STAT. § 351.175(2) (Vernon Supp. 1987) (provides only 60 days notice and does not provide for disbursements of excess upon sale); MONT. CODE ANN. § 35-1-603(3) (1985); NEB. REV. STAT. § 21-2016 (1983); N.H. REV. STAT. ANN. § 293-A:17(II) (1986); N.M. STAT. ANN. § 53-11-17 (Supp. 1987) (30 days notice); R.I. GEN. LAWS § 7-1.1-16 (1985); S.C. CODE ANN. § 33-9-60(d)-(e) (Law. Co-op. 1986); S.D. CODIFIED LAWS ANN. § 47-3-20 to -21 (1983); TEX. BUS. CORP. ACT ANN. art. 2.14D (Vernon 1980); UTAH CODE ANN. § 16-10-16 (1987); VT. STAT. ANN. tit. 11, § 1864(b) (1984); WASH. REV. CODE § 23A.08.140 (1985); W. VA. CODE § 31-1-80 (1982); WIS. STAT. ANN. § 180.13(2) (West 1957); WYO. STAT. § 17-1-114(b) (1987).

103. MODEL BUSINESS CORP. ACT § 17 (1969).

104. ARIZ. REV. STAT. ANN. § 10-017C (1977); FLA. STAT. ANN. § 607.051(4) (West 1977); GA. CODE ANN. § 14-2-83(d) (1982); N.Y. BUS. CORP. LAW § 503(d) (McKinney 1986) (penalties not amounting to forfeiture).

105. VA. CODE ANN. § 13.1-642D (1985).

106. MD. CORPS. & ASS'NS CODE ANN. § 2-206(c) (1985).

*Bridal Fair, Inc.*<sup>107</sup> held invalid a director's resolution stating that failure of shareholders to tender payment in cash for additional stock within thirty days from the date of resolution would result in forfeiture of all rights. The court said such resolution violated statutory language identical to the Model Business Corporation Act section stated above.<sup>108</sup>

## VII. SUBSCRIBERS' DEFENSES TO LIABILITY ON SUBSCRIPTIONS

Subscribers sued for unpaid subscriptions generally are entitled to defenses available in any contract action.<sup>109</sup> Subscription cases present special problems in the application of the following defenses:

### A. *Noncompliance with Federal or State Securities Laws*

Compliance with applicable securities laws may be an explicit condition to the enforcement of the subscription.<sup>110</sup> However, even if the subscription is silent, the courts<sup>111</sup> have permitted the subscriber, as the beneficiary of the registration requirements, to assert that the subscription was void even though the corporation could not use such defense.<sup>112</sup>

### B. *Fraud in the Inducement of the Subscriptions*

The expansion in federal and state securities law remedies for fraud in connection with the purchase or sale of securities has significantly reduced the number of such cases involving common law fraud principles. Nevertheless, enough recent litigation involves the area to merit

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107. 195 Neb. 166, 237 N.W.2d 138 (1976).

108. *Sweeney*, 237 N.W.2d at 140.

In *Brown v. United Community Nat'l Bank*, 282 F. Supp. 781, 784 (D.D.C. 1968), the court held the Model Act language inapplicable to a subscription for stock of a bank. In the absence of statute, the court upheld a directors' resolution forfeiting subscription rights when the tender was one day late.

109. *E.g.*, *Lex v. Selway Steel Corp.*, 203 Iowa 792, 206 N.W. 586, 594 (1925); 4 W. FLETCHER, *supra* note 18, § 1875.

State statutes have few provisions relating to defenses. See N.C. GEN. STAT. § 55-43(f) (1982) which provides that it generally is no defense to enforcement of a preincorporation subscription that no notice was given to the subscriber of his other rights to participate in selecting the first directors of the corporation.

110. *See, e.g.*, *Scholz Homes, Inc. v. Larson*, 411 F.2d 342, 345 (7th Cir. 1969).

111. *E.g.*, *General Life of Mo. Inv. Corp. v. Shamburger*, 546 F.2d 774 (8th Cir. 1976); *Kaiser-Frazer Corp. v. Otis & Co.*, 195 F.2d 838 (2d Cir.), *cert. denied*, 344 U.S. 856 (1952).

112. *A.C. Frost & Co. v. Coeur d'Alene Mines Corp.*, 312 U.S. 38, *modified*, 63 Idaho 20, 115 P.2d 928 (1941).

a brief summary of the area.<sup>113</sup>

A subscription induced by the fraud of corporate agents is not void, but is voidable at the option of the subscriber on discovery of the fraud if the subscriber elects to disaffirm the subscription within a reasonable time.<sup>114</sup> Rescission, either by notice to the corporation or by filing a suit to rescind, is required before the subscriber can rely on the fraud as grounds for rescission,<sup>115</sup> or in most states as a defense to an action to collect unpaid subscriptions.<sup>116</sup> A subscriber cannot rescind for fraud if he or she is guilty of laches either in discovering the fraud or in repudiating the subscription after discovery,<sup>117</sup> or if he or she ratifies the subscription with knowledge of the fraud.<sup>118</sup> In addition, some courts, relying on the trust fund doctrine,<sup>119</sup> hold that a subscriber cannot rescind for fraud if the corporation has entered into bankruptcy, liquidation, or receivership before notice of rescission was given.<sup>120</sup> Other courts permit rescission in such circumstances but hold it ineffective against creditors extending credit after the subscription was accepted.<sup>121</sup>

### C. *Nonfulfillment of Conditions*

Subscribers<sup>122</sup> frequently have asserted that their obligations under a subscription are impliedly or expressly contingent upon the occurrence of a specific event. Courts have often held that preincorporation

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113. See *Berg v. King-Cola, Inc.*, 227 Cal. App. 2d 338, 38 Cal. Rptr. 655 (1964) (action for rescission of subscription fraudulently induced); *Guynn v. Shulters*, 223 Miss. 232, 78 So. 2d 114, 119 (1955) (Blue Sky law inapplicable; damage action for fraud on stock subscription); *Skierka v. Skierka Bros., Inc.*, 629 P.2d 214, 218-19 (Mont. 1981) (subscription fraudulently induced by virtue of Montana statute); *Ryan v. Collins*, 496 S.W.2d 205 (Tex. Civ. App. 1973) (action for rescission of subscription fraudulently induced).

114. H. BALLANTINE, *supra* note 45, at 785.

115. E.g., *Ryan v. Collins*, 496 S.W.2d 205 (Tex. Civ. App. 1973).

116. 4 W. FLETCHER, *supra* note 18, § 1681. California courts hold that if no affirmative relief is sought (i.e., the fraud is used only as a defense), the subscriber need not give notice of rescission. E.g., *California Credit & Collection Corp. v. Randall*, 76 Cal. App. 321, 244 P. 958 (1926).

117. 4 W. FLETCHER, *supra* note 18, § 1697.

118. *Id.* § 1702.

119. Under the trust fund theory, corporate assets, including stock subscriptions, constitute a trust fund for the benefit of creditors. The theory has been substantially repudiated. H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS* 431-32 (1983).

120. H. BALLANTINE, *supra* note 45, at 787 n.26; see also *In re Stirling Homex Corp.*, 579 F.2d 206 (2d Cir. 1978) (defrauded shareholders subordinated in event of bankruptcy to general creditors), *cert. denied*, 439 U.S. 1074 (1979).

121. See 4 W. FLETCHER, *supra* note 18, § 1710.

122. On occasion, the corporation raises the issue to defeat the subscribers' status as a shareholder. See, e.g., *Berkowitz v. Linden Towers Coop. No. 5, Inc.*, 35 Misc. 2d 919, 231 N.Y.S.2d 85 (1962).

subscriptions are subject to implied conditions that the corporation formed will not be materially different from the one contemplated in the subscription<sup>123</sup> and that the corporation will not be defectively formed.<sup>124</sup> Most courts<sup>125</sup> construing express conditions have attempted to ascertain the parties' intent as to whether the condition is a condition precedent (with the consequence that until the occurrence of the condition the subscriber is not a shareholder and not liable), or is a condition subsequent<sup>126</sup> (with the consequence that until the occurrence of the condition the subscriber is a shareholder and is liable on the subscription). As the commentators observe,<sup>127</sup> this process does not explicitly weigh the interests of creditors and other subscribers against the interests of the subscriber, and consequently produces seemingly inconsistent results.<sup>128</sup> Finally, even if the condition is interpreted to be a condition precedent, a court may still conclude that the subscribers' conduct indicated an implied waiver of the condition.<sup>129</sup> If such conduct was performed with knowledge that the condition had not been fulfilled, the subscriber would again be liable on

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123. See discussion of cases in Cataldo, *Conditions in Subscriptions for Shares*, 43 VA. L. REV. 353, 354-56 (1957). Another group of cases holds that the abandonment of the corporate enterprise by the promoters, at least where creditor's rights are not affected, discharges subscribers to stock. See 4 W. FLETCHER, *supra* note 18, § 1755. The theory underlying such a decision is failure of consideration, rather than nonfulfillment of an implied condition. See, e.g., *Shield v. Lone Star Life Ins. Co.*, 202 S.W. 211 (Tex. Ct. App. 1918).

124. 4 W. FLETCHER, *supra* note 18, §§ 1897-1898.

Another condition frequently implied in the past was that the authorized share capital be fully subscribed. See *id.* § 1560. Modern statutes no longer require subscriptions for stated amounts of capital, and thus there no longer is any basis from which to imply the condition.

125. Compare *Wood v. Roy Lapidus, Inc.*, 10 Mass. App. Ct. 761, 413 N.E.2d 345, 347 (1980) with *Rodziewicz v. Giguere*, 5 Conn. App. 293, 497 A.2d 1025 (1985) (explicit condition (promise) to form corporation and convey stock within 60 days of subscription; corporation abandoned; subscriber not liable on subscription, but no mention of conditions). See also *Sheridan v. McBaine*, 660 S.W.2d 188 (Mo. Ct. App. 1983) (the court resolves a question of the effect of nonfulfillment of a condition precedent through the use of joint venture law).

126. Conditions other than conditions precedent may also be referred to as "special terms" or as "independent obligations." See 4 W. FLETCHER, *supra* note 18, § 1530.

127. E.g., Cataldo, *supra* note 123, at 358-65.

128. Compare *Cornhusker Dev. & Inv. Group, Inc. v. Knecht*, 180 Neb. 873, 146 N.W.2d 567 (1966) (subscription independent of agreement to build rest home; subscription enforced against subscriber) with *Texas City Hotel Corp. v. Wilkenfeld*, 410 S.W.2d 860 (Tex. Civ. App. 1966) (special term requiring construction of community hotel in Texas City breached; subscriber not liable). See also *Wood v. Roy Lapidus, Inc.*, 10 Mass. App. Ct. 761, 413 N.E.2d 345 (1980) (independent obligation; shareholder entitled to shares subject to obligation). *Berkowitz v. Linden Towers Coop. No. 5*, 35 Misc. 2d 919, 231 N.Y.S.2d 85 (1962) (subscriptions for 90% of dwelling units was a condition precedent; subscribers were not shareholders).

129. Cataldo, *supra* note 123, at 367-68 (1957); see also *Eggen v. Simonds*, 34 Ill. App. 2d 316, 181 N.E.2d 354 (1962) (subscriber who deliberately prevents fulfillment of condition is estopped from raising defense).

the subscription.<sup>130</sup>

### D. Release

Under the common law rules governing such events in most jurisdictions,<sup>131</sup> a corporation may release a subscriber from liability on his or her subscription only if, one, all shareholders have expressly<sup>132</sup> or impliedly<sup>133</sup> approved the release; two, the release would not be detrimental to creditors;<sup>134</sup> and three, the release is supported by adequate consideration.<sup>135</sup> These rules do not prevent a bona fide compromise of a dispute between the corporation and a subscriber as to liability on a subscription.<sup>136</sup>

Only two states, Arizona<sup>137</sup> and North Carolina,<sup>138</sup> govern releases by statute. Both empower the board of directors, absent contrary stated restrictions,<sup>139</sup> to determine whether and upon what terms the obligation of any subscribers may be released, settled, or compromised.<sup>140</sup> The North Carolina statutes go on to treat a release accepted by the corporation as the equivalent of a purchase by the corporation of the shares in question, and thus subject to the North

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130. 4 W. FLETCHER, *supra* note 18, § 1525.

131. Only two states have statutory provisions related to release of subscriptions. *See* ARIZ. REV. STAT. ANN. § 10-017D (1977); N.C. GEN. STAT. § 55-43(k) (1982); *supra* text accompanying note 133.

132. *E.g.*, Little Switz. Brewing Co. v. Oxley, 156 W. Va. 800, 197 S.E.2d 301, 306 (1973); *cf.* Cerami v. Dignazio, 283 Pa. Super. 424, 424 A.2d 881, 886 (1981) (court affirmed chancellor's determination that parties had not mutually agreed to a release).

133. *E.g.*, Sobol v. Avila, 480 P.2d 116, 120 (Colo. Ct. App. 1970).

134. *E.g.*, *id.* at 120; 4 W. FLETCHER, *supra* note 18, § 1747; *see also* Denniston & Co. v. Jackson, 468 So. 2d 170, 174 (Ala. Civ. App. 1985) (court invalidated an attempted cancellation of a subscription relying on an Alabama statute to protect existing creditor).

The cases are in conflict on whether creditors extending credit subsequent to the release are included in the limitation. 4 W. FLETCHER, *supra* note 18, § 1748.

135. *E.g.*, Wood v. Roy Lapidus, Inc., 10 Mass. App. Ct. 761, 413 N.E.2d 345, 348 (1980); Murphy v. Panton, 96 Wash. 637, 165 P. 1074 (1917).

136. *See* Annotation, *Validity of Release, Cancellation, or Compromise of Unpaid Subscription for Stock by Corporation or Its Representative*, 101 A.L.R. 231, 259-62 (1936). The corporation's ability to enter such compromises must be carefully distinguished from a creditor's ability to compromise the liability of less than all of delinquent subscribers in a corporation. *See* Davis v. Olson, 4 Wash. App. 390, 392, 482 P.2d 795, 797 (1971) (trust fund doctrine required creditor to prorate claims among all delinquent subscribers).

137. ARIZ. REV. STAT. ANN. § 10-017D (1977).

138. N.C. GEN. STAT. § 55-143(k) (1982).

139. ARIZ. REV. STAT. ANN. § 10-017D (1977) states "[u]nless otherwise provided in the subscription . . . ." N.C. GEN. STAT. § 55-43(k) (1982) states "[u]nless otherwise restricted by the charter or bylaws . . . ."

140. *See also* GA. CODE ANN. § 14-2-83(e) (1982) (empowers the directors to compromise disputes arising out of a subscription).

Carolina restrictions on repurchases of shares.<sup>141</sup> While these statutes represent a minority view,<sup>142</sup> they eliminate a long-time “quirk of the law”<sup>143</sup> and thus merit emulation.

### VIII. CONCLUSION

Twenty years ago I argued as part of an assessment of the financial provisions of the Model Business Corporation Act that the Model Act subscription provision should be reformulated.<sup>144</sup> It is, of course, disappointing to discover that very little legislative action has been taken in the meantime either by the drafters of the Revised Model Act or by legislatures. Perhaps that is because most of the controversies involving subscriptions appear to involve small businesses, and possibly in turn, practitioners who do not specialize in corporate law. Those speculations would only strengthen the argument for statutory reform to include provisions that operate as a better road map through such transactions and fill likely gaps in such agreements. Such provisions can surely be justified as reducing the costs of uncertainty and litigation imposed on such enterprises by the current system of laws.

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141. N.C. GEN. STAT. § 55-43(k) (1982).

142. Two other states, Arkansas and Tennessee, for many years also had provisions like those of North Carolina. See ARK. STAT. ANN. § 64-203E (1980); TENN. CODE ANN. § 48-1-504(e) (1984). Both states recently adopted the Revised Model Act provisions, thereby eliminating the earlier release provisions. See ARK. STAT. ANN. § 64-605 (1980); TENN. CODE ANN. § 48-6-201 (1984).

143. H. BALLANTINE, *supra* note 45, at 460. Ballantine felt that the financial effects of a release were equivalent to those of a repurchase of shares. *Id.* at 459-60.

144. See Kummert, *The Financial Provisions of the New Washington Business Corporation Act*, 41 WASH. L. REV. 207, 241-42 (1966).